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August 28, 1998

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie R. Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

Re: Petition for Preemption of Section 392.410(7)  
of the Revised Statutes of Missouri  
CC Docket No. 98-122

Dear Ms. Salas:

Enclosed for filing are an original and 12 copies of the  
Reply Comments of Southwestern Bell Telephone Company.

Please call me at 202-326-7934 with any questions. Thank  
you for your assistance in this matter.

Sincerely,



Rebecca A. Beynon

Enclosures

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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Petition for Preemption of Section 392.410(7)  
of the Revised Statutes of Missouri Under  
Section 253 of the Communications Act of  
1934, As Amended

CC Docket No. 98-122

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**REPLY COMMENTS OF  
SOUTHWESTERN BELL TELEPHONE COMPANY**

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*Attorneys for Southwestern Bell Telephone Company*

August 28, 1998

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**REPLY COMMENTS OF  
SOUTHWESTERN BELL TELEPHONE COMPANY**

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Southwestern Bell Telephone Company ("Southwestern Bell") hereby submits this reply to the comments filed in response to the petition of the Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield, Columbia Water & Light, and the Sikeston Board of Utilities seeking an order that House Bill 620, codified in section 392.410(7) of the Revised Statutes of Missouri ("HB 620"), is preempted by section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253.<sup>1</sup> Most of the comments supporting petitioners merely repeat the arguments made in the petition, and Southwestern Bell stands by its initial comments. However, Southwestern Bell will take this opportunity briefly to address those few matters raised in the comment round that call for a response.

1. All of the comments supporting the petition make the same interpretive mistake: they argue that because the term "any entity" is broad enough to include municipalities and

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<sup>1</sup> Comments were filed by the American Public Power Association ("APPA"), GTE Service Corporation and its affiliated telecommunications companies, MCI Telecommunications Corporation ("MCI"), the Missouri Attorney General, the National Telephone Cooperative Association, and UTC, the Telecommunications Association ("UTC").

municipally owned utilities, Congress must have intended the term to include such public entities; after all, so the argument goes, Congress would otherwise have inserted the word "private" between "any" and "entity." See UTC Comments at 10; MCI Comments at 3-4; APPA Comments at 4. But as Southwestern Bell explained in its initial comments, there is a legal presumption that Congress does not intend to override a State's traditional exercise of sovereign authority — such as whether to allow its own political subdivisions to participate as competitors in markets that they regulate — unless it is plain in the statute itself that this was Congress's intention. See Southwestern Bell Comments at 15-16. The fact that it is possible to read the term "any entity" to include municipalities and municipally owned utilities is simply not enough; the plain statement rule of Gregory v. Ashcroft, 501 U.S. 452 (1991), requires that Congress make explicit its intention to include municipalities and municipally owned utilities under the category of "entity." In marked contrast to other statutory schemes where courts have found the plain statement rule satisfied, see Southwestern Bell Comments at 16-17, Congress nowhere indicated in the Communications Act that the term "any entity" includes a municipality. That is the end of the matter.

Indeed, the Commission makes this same argument in its brief before the D.C. Circuit in the City of Abilene case.<sup>2</sup> As this Commission convincingly stated,

petitioners erroneously suggest that Congress had an obligation to make clear that it did not intend to preempt State laws governing municipalities. They make this argument more explicitly when they assert that Congress "would surely have inserted the word

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<sup>2</sup> City of Abilene v. FCC, Nos. 97-1633, 97-1634 (D.C. Cir. Oct. 14, 1997) (reviewing Memorandum Opinion and Order, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, 13 FCC Rcd 3460 (1997) ("Texas Order")).

‘private’ between ‘any’ and ‘entity’ in Section 253(a) if that had been its intent.” Petitioners seem to think that this Court must read section 253 to authorize preemption in this case unless Congress has plainly stated otherwise. Exactly the opposite is true. Unless Congress has plainly stated an intention to authorize FCC preemption of the States’ authority to limit the activities of their own municipalities, the Court must assume that section 253 does not sanction such preemption.

Brief for Respondents at 16, City of Abilene v. FCC, Nos. 97-1633, 97-1634 (D.C. Cir. July 15, 1998) (emphasis in original) (citation omitted).

2. In a futile attempt to suggest that this Commission’s prior decision in the Texas Order actually supports petitioners’ claim here, both the APPA and UTC refer to a passage in the Texas Order where this Commission indicated that “[m]unicipal entry can bring significant benefits by making additional facilities available for the provision of competitive services” (Texas Order, 13 FCC Rcd at 3549 [¶ 190]). See APPA Comments at 4; UTC Comments at 5-6. Although Southwestern Bell believes that municipal entry is more likely to harm competition than encourage it,<sup>3</sup> this debate belongs in the Missouri General Assembly. Having lost the argument in the State’s legislature, petitioners and their supporters are now seeking to have this Commission second-guess the policy choices of Missouri’s elected representatives.

Moreover, none of the commenters supporting petitioners even acknowledge that the Missouri prohibition on municipal entry is far less restrictive than that which was upheld in the Texas Order. See generally Southwestern Bell Comments at 6-7. HB 620 not only expires in four years, it also explicitly permits municipalities to provide telecommunications services for its

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<sup>3</sup> See, e.g., Letter from Springfield Mayor Leland L. Gannaway to State Senator Morris Westfall 1 (Apr. 8, 1997) (Attached as Exhibit G to Southwestern Bell Comments) (“It is so very difficult for private companies to maintain an interest in competing with a company which owns the right-of-way in which it must locate the skeleton of its infra-structure and the poles for which it must negotiate ‘pole attachment agreements.’”).

own use, for 911 and other emergency services, for medical or educational purposes, to students through an educational institution, and to "internet type" services. See Mo. Rev. Stat. § 392.410(7) (1997). HB 620 is a far cry from the "absolute prohibitions" and "outright ban[s]" on municipal entry that this Commission criticized in the Texas Order. 13 FCC Rcd at 3549 [¶ 190].

3. Finally, MCI fundamentally misunderstands the structure of section 253. In its comments supporting the petition, MCI asserts that "HB 620 is unlawful under section 253(b) of the Act." MCI Comments at 4. But the question whether a state or local regulation is valid under subsection (b) of section 253 is not even reached unless the regulation first is found to violate subsection (a). As this Commission clearly stated, "we first determine whether the challenged law, regulation or legal requirement violates the terms of section 253(a) standing alone. If we find that it violates section 253(a) considered in isolation, we then determine whether the requirement nevertheless is permissible under section 253(b)." Texas Order, 13 FCC Rcd at 3480 [¶ 42] (emphasis added). It is simply irrelevant whether HB 620 can be justified as a "necessary" and "competitively neutral" requirement to "protect the public safety and welfare," 47 U.S.C. § 253(b); because HB 620 does not violate subsection (a), there is no reason even to consider whether it might otherwise be upheld as a lawful exercise of state authority under subsection (b).

### CONCLUSION

For the foregoing reasons, and for the reasons contained in its initial comments, Southwestern Bell respectfully requests that the Commission deny the petition for preemption.

Respectfully submitted,

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August 28, 1998

## CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 1998, a true and correct copy of the foregoing Reply Comments of Southwestern Bell Telephone Company was served by United States first-class mail, postage prepaid, or by hand delivery as indicated, to the following parties:

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